FILED
DEC 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-505

# In the Supreme Court of the United States

OCTOBER TERM, 1986

---

LUBBOCK INDEPENDENT SCHOOL DISTRICT, PETITIONER

*v.*

THE TEXAS EDUCATION AGENCY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

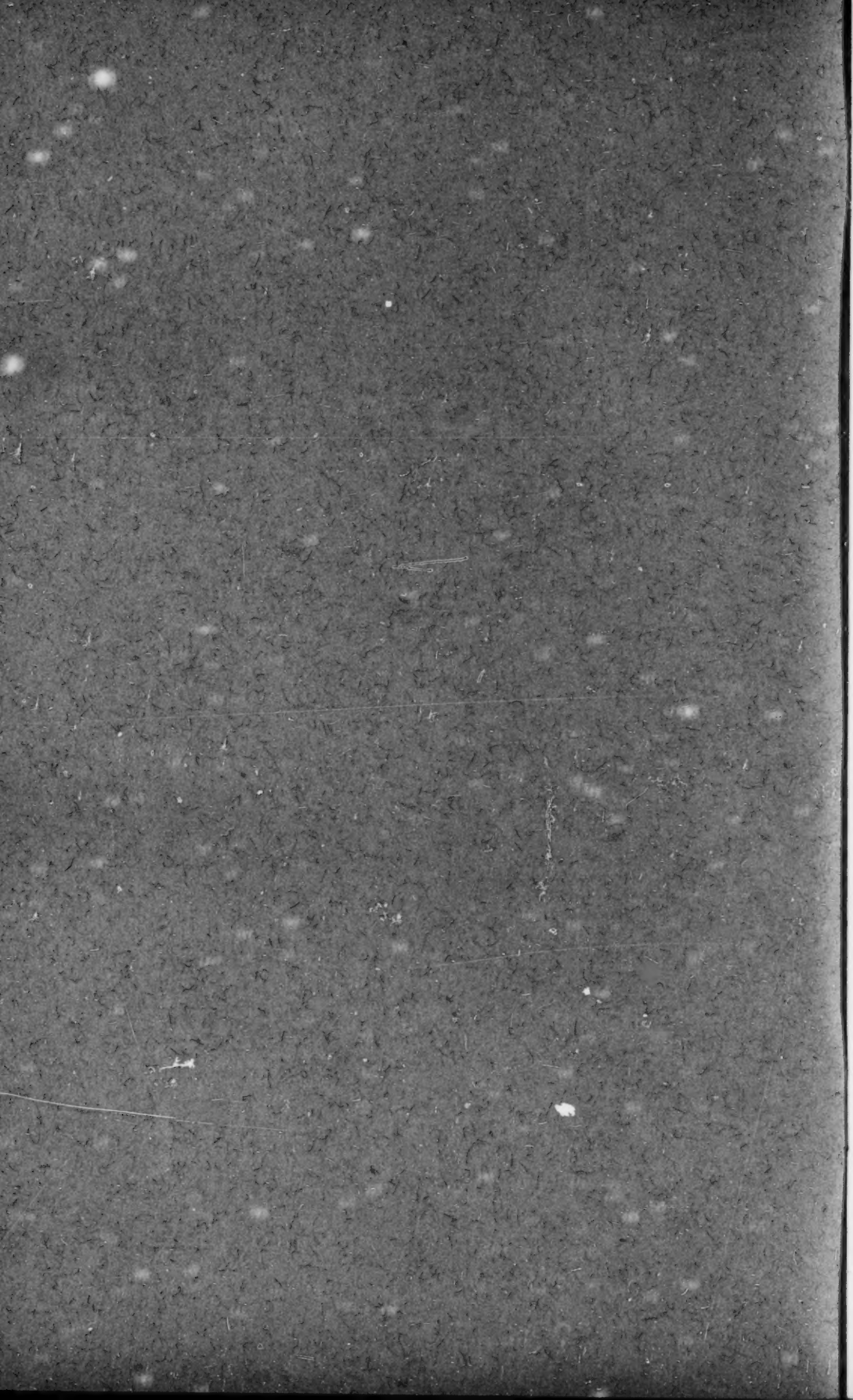
---

CHARLES FRIED
*Solicitor General*

WM. BRADFORD REYNOLDS
*Assistant Attorney General*

WALTER W. BARNETT
FRANK D. ALLEN, JR.
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*



## QUESTION PRESENTED

Whether part of the cost of a desegregation remedy should be assigned to a state education agency that has not been adjudged responsible for the underlying unconstitutional condition.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 4 |
| Conclusion | 7 |
| Appendix | 1a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Arthur* v. *Nyquist*, 712 F.2d 809, cert. denied, 466 U.S. 936 | 4 |
| *General Building Contractors' Ass'n* v. *Pennsylvania*, 458 U.S. 375 | 4, 6 |
| *Hills* v. *Gautreaux*, 425 U.S. 284 | 4 |
| *Liddel* v. *Missouri*, 731 F.2d 1294, cert. denied, 469 U.S. 816 | 4 |
| *Milliken* v. *Bradley*, 433 U.S. 267 | 4, 6 |
| *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 | 5 |
| *United States* v. *Board of School Commissioners*, 677 F.2d 1185, cert. denied, 459 U.S. 1086 | 4 |
| *United States* v. *TEA*, 600 F.2d 518 | 2 |


Constitution:


| | |
|---|---|
| U.S. Const. Amend. XI | 5, 6 |

# In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-505

LUBBOCK INDEPENDENT SCHOOL DISTRICT, PETITIONER

*v.*

THE TEXAS EDUCATION AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (which is reprinted in an appendix to this brief) is reported at 790 F.2d 1262. The opinion of the district court (Pet. App. A1-A3) is unreported. Previous opinions of the court of appeals are reported at 431 F.2d 1313 and 600 F.2d 518. Previous opinions of the district court (Pet. App. E1-E16) are unreported and reported at 455 F. Supp. 1223.

### JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986. A petition for rehearing was denied on July 3, 1986. The petition for a writ of certiorari was filed on September 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

### STATEMENT

1. The United States initiated this action in district court in 1970, demanding that respondent, Texas Education Agency (TEA), require six school districts, including

petitioner, Lubbock Independent School District, to prepare and submit appropriate school desegregation plans (App., *infra*, 2a). The actions against the various districts were subsequently severed, however, and the United States had to proceed separately against petitioner (*ibid.*). After a full trial, the court found that several schools in petitioner's district were "racially identifiable" (Pet. App. E3-E4, E9, E12-E14). The court did not determine what caused these particular schools to take on their racial character; it simply ordered petitioner to take specific affirmative steps to desegregate them (*id.* at E7-E8, E9-E10, E14-E15). Though TEA was nominally a party to this action, it did not participate in the proceedings and the court did not award any relief against it (App., *infra*, 2a, 3a). Petitioner did not appeal the court's judgment (*id.* at 3a).

In 1977, petitioner requested that the court permit it to implement a new building construction program (App., *infra*, 3a). The United States opposed this request and, instead, asked the court to order petitioner to further desegregate its schools (*ibid.*). After another hearing, the court agreed with the United States that petitioner had continued to segregate black and Hispanic school children and ordered petitioner to implement more extensive desegregation measures (*ibid.*). Again, though still named as a nominal defendant, TEA did not participate in the proceedings, was not adjudged responsible for the unlawful conditions, and had no relief directed against it (*id.* at 2a).

Not satisfied with the relief granted against petitioner, the United States sought review of the district court's order (App., *infra*, 3a). Accepting the United States' arguments, the appellate court remanded for a determination whether the additional segregation found in 1977 was the product of deliberate school board action. See *United States* v. *TEA*, 600 F.2d 518, 529 (5th Cir. 1979). The district court then entered additional findings, from which both peti-

tioner and the United States appealed (App., *infra*, 3a). While these appeals were pending, however, petitioner and the United States settled their dispute, submitted a proposed consent decree to the district court, and voluntarily dismissed the appeals (*id.* at 3a-4a). The district court approved the proposed decree in November 1983 (*ibid.*). TEA took no part in the negotiation of the decree, was not a party to it, and had no obligations under it (*id.* at 4a).

2. Nevertheless, in August 1984, petitioner filed a motion with the district court, which asserted that the State of Texas was partially responsible for the segregation within petitioner's schools and that TEA should reimburse petitioner for part of the costs of implementing the court-imposed desegregation remedies (see App., *infra*, 4a; see also Pet. App. A1). But the court found that "[t]he issues [previously] before [it] and the Court of Appeals concerned actions taken by the school board well after the State had abolished [its] dual education system" (Pet. App. A2) and that "nothing in the record * * * indicate[d] that the State was in any way responsible for the continued segregation of Lubbock schools" (*ibid.*). Accordingly, it refused to hold TEA "liable for a part of the costs of desegregation" (*ibid.*).

3. The court of appeals affirmed (App., *infra*, 1a-7a). It found that "the district court's original order in this case—the 1970 order upon which [petitioner] bases its entire argument—did not attribute responsibility for specific segregation to any [specific] defendant" (*id.* at 5a) and that, by contrast, "[t]he 1977 order * * * seems to indicate unmistakably that the only culpable party was [petitioner]" (*ibid.*). Furthermore, the court noted that petitioner "did not seek to recover any costs for the period between 1970 and 1977" (*id.* at 6a), the only period during which "the district court order even *arguably* pertained to the State of Texas; the 1977 and subsequent orders were explicitly directed at—and limited to—[petitioner]" (*ibid.* (emphasis

in original)). Accordingly, the court agreed with the district court that TEA had "never been adjudicated responsible for that segregation in Lubbock which has proven costly to eliminate" (*id.* at 7a), that petitioner's "belated effort to recover costs" was simply "an attempt[] [to make] an end-run around the Texas legislature's allocation of state funds" (*ibid.*), and that petitioner's motion to divide costs was without merit (*ibid.*).

## ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or with the decision of any court of appeals. Accordingly, further review is not warranted.

1. This Court has long held that federal courts may order defendants to remedy only those violations of federally secured rights for which the defendants have been held legally responsible. See *General Building Contractors' Ass'n* v. *Pennsylvania*, 458 U.S. 375, 397-401 (1982); *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976). Thus, this Court and the courts of appeals uniformly have allowed a state or its officials to be held liable for part of the cost of a desegregation remedy only when the state or its officials have first been found to have caused, in whole or in part, the constitutional wrong in question. See *Milliken* v. *Bradley*, 433 U.S. 267, 282-283 (1977); *Liddell* v. *Missouri*, 731 F.2d 1294, 1297 (8th Cir.), cert. denied, 469 U.S. 816 (1984); *Arthur* v. *Nyquist*, 712 F.2d 809, 810-811 (2d Cir. 1983), cert. denied, 466 U.S. 936 (1984); *United States* v. *Board of School Commissioners*, 677 F.2d 1185, 1186 (7th Cir.), cert. denied, 459 U.S. 1086 (1982). Since neither the State of Texas nor TEA has ever been adjudged responsible for the segregation in petitioner's schools, the court below was quite correct in holding that TEA may not be required to pay for part of the costs petitioner has incurred in desegregating its racially identifiable schools. See *General Building Contractors'*

*Ass'n* v. *Pennsylvania*, 458 U.S. at 400-401; cf. *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981) (no federal right to contribution, except in admiralty matters, without a statute authorizing such a remedy).

2. Petitioner errs in suggesting (Pet. 7-8) that TEA has in fact been found "culpable" for the segregation that petitioner has been required to remedy (and for the costs of which petitioner now seeks reimbursement). For one thing, neither the State of Texas nor TEA has ever expressly been held legally responsible for the "racial identifiability" of any schools in petitioner's district. While the district court's 1970 decree does suggest that vestiges of state-mandated segregation remained extant in Lubbock at that time (see Pet. App. E3-E4, E9, E12-13), the decree does not "indicate whether the actual segregation then [in] evidence resulted primarily from earlier state laws or from subsequent * * * gerrymandering of attendance zones" by petitioner (App., *infra*, 5a). By contrast, "[t]he 1977 order * * * seems to indicate unmistakably that the only culpable party was [petitioner]" (*ibid.*). In any event, as both the district court and the court below noted (see Pet. App. A1; App., *infra*, 5a-6a), "the money [petitioner] expended for purposes of desegregation (which it now seeks to recover) grew out of the district court's 1977 and subsequent orders" (App., *infra*, 6a), and those "orders were explicitly directed at—and limited to—[petitioner]" (*ibid.*). Thus, the costs that petitioner now seeks to recover clearly do not arise from remedies attributed to any acts of discrimination for which the State of Texas or TEA has formally been adjudged responsible.

3. Likewise, petitioner plainly errs in suggesting (Pet. 8-9) that the court below relied on the Eleventh Amendment in affirming the district court's denial of petitioner's motion to divide costs. The court referred to the Eleventh Amendment only once in its opinion—in describing one of the bases of the district court's holding—and clearly did

not base its decision on that Amendment. See App., *infra*, 4a. Rather, the court based its decision on the principle that a federal court should not order a party to remedy a constitutional violation for which that party has not been adjudged legally responsible. See *id.* at 4a-6a (discussing this Court's decision in *Milliken* v. *Bradley*, 433 U.S. 267 (1977)). As noted above, that principle is well established in this Court's case law. See *id.* at 282-283; *General Building Contractors' Ass'n* v. *Pennsylvania*, 458 U.S. at 397-401.[1]

4. As the plaintiff in this case, the United States has a significant interest in ensuring that the financial responsibility for ending school desegregation is properly allocated. Under the theory advanced by petitioner, every school district in the southern and border states which required separate schools for white and black children prior to 1954 could attempt to recover part of the costs of their desegregation remedies from their parent state school agencies, regardless of whether findings supporting liability of those agencies have been made, or whether the United States has ever sought to hold the state-level education officials or agencies liable. Reallocating the responsibility for desegregation remedies in this fashion, however, would simply discourage state school agencies from cooperating with the United States and from prompting local school districts to remedy the vestiges of their past discrimination. The court below properly declined to undermine the United States' enforcement efforts in this manner.

---

[1] The court's suggestion (App., *infra*, 7a) that petitioner's "belated effort to recover costs" is an attempt to make an "end-run around the Texas legislature's allocation of state funds" is clearly *dictum*. In any event, the observation is not a statement that the Eleventh Amendment barred petitioner's motion, but rather an understandable rebuke of petitioner's morning-after litigation tactics.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
*Solicitor General*
WM. BRADFORD REYNOLDS
*Assistant Attorney General*
WALTER W. BARNETT
FRANK D. ALLEN, JR.
*Attorneys*

DECEMBER 1986

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 85-1265.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

*v.*

TEXAS EDUCATION AGENCY,
DEFENDANT-APPELLEE

*v.*

LUBBOCK INDEPENDENT SCHOOL
DISTRICT, DEFENDANT-APPELLANT

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS**

---

June 4, 1986

---

**OPINION**

Before: THORNBERRY, POLITZ and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

This case grows out of the Lubbock Independent School District's attempt to recoup from the State of Texas monies expended in an effort to desegregate schools in the district. The district court denied the school district's motion to divide costs. We affirm.

I.

The United States initiated this litigation when, in 1970, it sued the Texas Education Agency ("TEA") and six school districts in order to abolish vestiges of the dual school system in Texas. Following a limited appeal and this court's subsequent decision in *United States v. TEA*, 431 F.2d 1313 (5th Cir. 1970), the various actions were severed, so that the only school district involved in the present litigation is the Lubbock Independent School District ("LISD").

The TEA filed an answer in response to the United States' complaint in the suit against it and the LISD, but the TEA was not heard from again until the LISD filed a motion to divide costs in 1984. During the intervening years, despite the active status of the case as well as the issuance of numerous court orders pertaining to relief (filed in 1972, 1973, 1977, 1978, and 1983), the TEA was not involved. It was simply not a participant in the suit or its ongoing proceedings.

After a trial concerning the United States' original complaint in 1970, the district court found that certain schools in the LISD were unconstitutionally segregated. The court in 1970 did not delineate the reasons why particular schools remained segregated. The court did observe, however, that Dunbar High School "was traditionally operated as a segregated black school under the laws of the State of Texas and the vestige of a dual system, in which [Dunbar] was segregated as black, remains to this day." Likewise, the court found that Struggs Junior High School "is a remainder and vestige of the dual operation in existence prior to 1954." However, Struggs did not open until 1965. Of the four elementary schools found to be unconstitutionally segregated (Wheatley, Ella Isles, Guadalupe, and Sanders), the court found that two were unconstitutionally segregated with respect to blacks, and the other two with respect to Hispanics. The State of

Texas did not mandate even before 1954 that Hispanics be segregated; the LISD took this action on its own. And with respect to the black elementary schools—and the other unconstitutionally segregated black schools as well—the district court, while acknowledging that pre-1954 state law had, at one time, mandated separate schools, did not explain why the schools were still segregated in 1970, probably because the court was not called upon to do so.

Although the district court in 1970 did not specifically allocate or apportion the fault or the blame for the segregation in Lubbock between the LISD and the TEA, the court did order relief. That relief was directed solely at the LISD, not the TEA. Nevertheless, the LISD did not in 1970 file a motion for a division of costs, or anything similar. Neither party appealed from the order in 1970.

In 1977, the LISD sought permission from the district court to proceed with its building construction program. The United States opposed this request and also asked for supplemental desegregation relief, alleging that the LISD had continued to segregate blacks and Hispanics. The district court ordered further relief, *United States v. LISD,* 455 F.Supp. 1223 (N.D. Tex. 1978), *aff'd,* 601 F.2d 585 (5th Cir. 1979). Following the issuance of subsequent orders by the district court, the United States, not satisfied with the extent of the relief granted, appealed. This court remanded the case to the district court for further factual findings. *United States v. TEA,* 600 F.2d 518, (5th Cir. 1979). We instructed the district court to make specific inquiries in determining whether the segregation in certain schools which had once been integrated was a product of deliberate school board action. 600 F.2d at 529.

Following the remand, the district court entered further orders, from which both the United States and the LISD appealed. However, while the appeal was pending, the United States and the LISD agreed to settlement terms, so the appeals were voluntarily dismissed. The district court

entered a consent decree and order on November 29, 1983. This order reflected settlement negotiations between the LISD and the United States; the TEA was not involved. In addition, the relief ordered by the decree was directed, again, exclusively at the LISD, not the TEA.

Finally, the LISD filed a motion to divide costs in August, 1984, asserting that segregation within the LISD had been caused, in part, by actions of the State of Texas. The motion alleged that costs incurred in implementing the desegregation remedies approached $9 million. The district court denied the motion, explaining that the TEA had never been adjudged liable for the segregative acts which entailed the LISD's monetary expenditures, and that the Eleventh Amendment barred the recovery sought by the LISD against the State.

II.

The LISD argues that although it did segregate schools according to race, the responsibility for so doing was not its alone. The LISD acted in accordance with the law of the State of Texas. *See* Tex. Const. art. 7 § 7 (Vernon 1955); Tex.Rev.Civ.Stat.Ann. art. 2900, 2900a (Vernon 1965). Accordingly, the LISD asked that the district court use its equitable powers to apportion the costs of remedying segregation among the various parties responsible for creating it.

In *Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (*Milliken II*), the Supreme Court reviewed a court-ordered desegregation plan in which the district court directed that costs attributable to the plan be borne equally by the two groups of defendants responsible for prior constitutional violations: the Detroit School Board and the State of Michigan. 433 U.S. at 277, 97 S.Ct. at 2755. In affirming the remedy as well as the allocation of costs, the Court explained that the " 'condition' offending the Constitution is Detroit's de jure segregated school

system, which was so pervasively and persistently segregated *that the District Court found that the need for educational components flowed directly from constitutional violations by both state and local officials."* 433 U.S. at 283, 97 S.Ct at 2758 (emphasis added).

The LISD argues that the district court in this case did find, in 1970, that the segregation in the Lubbock schools—i.e., the unconstitutional condition—resulted from actions of the State as well as the LISD. Thus, the appropriate remedy, as exemplified by *Milliken II,* would be to divide costs between the LISD and the State of Texas. In effect, the LISD insists that the State of Texas not be permitted to escape the consequences of its own unlawful action.

The LISD's reliance on *Milliken II* as authorizing a division of costs in this case is misplaced for several reasons. Unlike the district court's findings in *Milliken II,* the district court's original order in this case—the 1970 order upon which the LISD bases its entire argument—did not attribute responsibility for specific segregation to any particular defendant. The district court did state, and it can hardly be denied, that vestiges of state-mandated segregation still remained extant in Lubbock in 1970. However, the court did not indicate whether the actual segregation then evidence resulted primarily from earlier state laws or from subsequent LISD gerrymandering of attendance zones. Significantly, though, the relief ordered by the district court was directly solely at the LISD, not the State. Moreover, and rather important, the relief ordered in 1970 proved virtually costless to the LISD; the LISD's effort to recoup money pertains to funds expended after the entry of the 1977 order.

The 1977 order, however, seems to indicate unmistakably that the only culpable party was the LISD. The State of Texas was not an active party to the proceedings in 1977-78. The district court's memorandum opinion and

order discusses only the segregative action of the LISD. The LISD gerrymandered school attendance zones and refused to take action which would have helped remedy that segregation which had been caused, in part, by pre-1954 state law. *See* 3 Record at 472-509. The court ordered the LISD to prepare a plan which would ameliorate segregation, and the LISD prepared and submitted a plan without, insofar as the record reflects, any assistance from the State.

The opinion of this court which reviewed the remedy ordered by the district court in 1977-78 evidences a recognition that the district court attributed segregation exclusively to "School Board action." 600 F.2d at 521. Specifically, the district court found in 1977 that the LISD's actions relating to student assignment, the drawing of attendance zones, and its decisions concerning school construction perpetuated and reinforced existing segregation and led, in addition, to further segregation. *See* 600 F.2d at 522-24. Our opinion did not disturb these findings.

As the affidavits submitted by the LISD attest, the money expended for purposes of desegregation (which it now seeks to recover) grew out of the district court's 1977 and subsequent orders. *See* 7 Record at 1077 (itemizing expenses for 1977-78 through 1982-83, and estimating expenses for 1983-84). The LISD did not seek to recover any costs for the period between 1970 and 1977. Yet it was only during that period that the district court order even *arguably* pertained to the State of Texas; the 1977 and subsequent orders were explicitly directed at—and limited to—the LISD.

III.

Finally, we pause to note the peculiar procedural posture of this case. The LISD certainly could have moved in 1977—or as early as 1970—for the district court to amend its judgment so as explicitly to adjudicate the State

of Texas' fault. *See* Fed.R.Civ.P. 60(b). Further, the LISD could have moved in 1977, once it became clear what the effort to desegregate would cost, that the court divide these costs among the parties deemed responsible for the then-existing segregation. *Cf. Milliken II,* 433 U.S. at 283. But the LISD pursued neither of these alternatives, and we express no view of what their proper resolution might have been. We are left instead with the LISD's belated effort to recover costs which smacks of an attempted end-run around the Texas legislature's allocation of state funds. Yet the State has not been an active party to this suit since 1970, and it has never been adjudicated responsible for that segregation in Lubbock which has proven costly to eliminate. Accordingly, the judgment of the district court is AFFIRMED.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40091